

**United States Department of Labor
Employees' Compensation Appeals Board**

J.A., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Tampa, FL, Employer**

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**Docket No. 14-1968
Issued: July 24, 2015**

Appearances:

*Wayne Johnson, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On September 9, 2014 appellant, through counsel, filed a timely appeal of a March 14, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ Because more than 180 days elapsed from the most recent OWCP merit decision dated February 28, 2013 to the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

¹ On March 3, 2015 the Board issued an order dismissing appeal in the above entitled case. The Board found that the record did not contain a March 14, 2014 decision. The Board determined that the most recent decision contained in the record was the February 28, 2013 merit decision and therefore, the appeal was not filed within 180 days from the date of issuance of OWCP's most recent decision. 20 C.F.R. § 501.3(e). On April 1, 2015 appellant, through counsel, filed a petition for reconsideration. Counsel provided a copy of OWCP's March 14, 2014 decision. On May 5, 2015 the Director of OWCP filed an answer to the petition for reconsideration. He determined that the March 14, 2014 decision was issued but was "inadvertently omitted from iFECS." The Director requested that the Board rule justly on the petition. On July 8, 2015 the Board issued an order granting the petition for reconsideration and reinstating the appeal.

² 5 U.S.C. §§ 8101-8193.

ISSUE

The issue is whether OWCP properly determined that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

FACTUAL HISTORY

On June 18, 2012 appellant, then a 32-year-old rural carrier, filed an occupational disease claim alleging that repetitive work duties, which included lifting packages and twisting in her truck to place mail in mailboxes, caused her upper and lower back pain. She stopped work on May 22, 2012. The employing establishment claimed it was not notified about the injury until June 18, 2012.

In a July 31, 2012 decision, after development, OWCP denied appellant's claim finding that she had submitted insufficient medical evidence explaining how work factors caused or contributed to a diagnosed medical condition.

On August 8, 2012 appellant submitted additional evidence and requested a telephonic hearing, which was held on December 17, 2012. During the hearing, she testified that she had worked for more than seven years as a rural carrier and detailed the repetitive duties of her position, which included, sorting and preparing the mail for delivery, and twisting, bending, and stooping while delivering mail.

By decision dated February 28, 2013, an OWCP hearing representative affirmed the July 31, 2012 decision denying the claim. He noted that appellant had not presented any medical evidence which contained a discussion, opinion, or conclusion from an examining physician which addressed the identified work factors and explained how the employment duties caused or aggravated the diagnosed conditions by direct cause or aggravation.

Appellant's representative requested reconsideration, by letter dated February 27, 2014, but not received until March 11, 2014. In support of the request, appellant submitted reports from Dr. Brian Patterson, Board-certified in family medicine.

In a March 14, 2014 decision, OWCP denied appellant's request for reconsideration, finding that it was untimely filed within one year of the last merit decision, February 28, 2013, and failed to present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA³ vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”⁴

OWCP’s imposition of a one-year time limitation within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of discretionary authority granted OWCP under section 8128(a).⁵ This section does not mandate that OWCP review a final decision simply upon request by a claimant.

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, section 10.607(a) of the implementing regulations provide that an application for reconsideration must be received within one year of the date of OWCP’s decision for which review is sought.⁶

Section 10.607(b) states that OWCP will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by OWCP in its most recent merit decision. The reconsideration request must establish that OWCP’s decision was, on its face, erroneous.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence that does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.⁸ To show clear

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8128(a).

⁵ *Diane Matchem*, 48 ECAB 532, 533 (1997); citing *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁶ 20 C.F.R. § 10.607(a) (2012).

⁷ *Id.* at § 10.607(b).

⁸ *Steven J. Gundersen*, 53 ECAB 252, 254-55 (2001).

evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in the medical opinion or establish a clear procedural error, but must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision. The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.⁹

ANALYSIS

The Board finds that appellant filed an untimely request for reconsideration. The last OWCP merit decision in this case was issued on February 28, 2013. The reconsideration request was not received until March 11, 2014. While the reconsideration request was dated February 27, 2014, OWCP regulations specify that an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹⁰ Because more than one year elapsed from February 28, 2013 to March 11, 2014, the date on which the reconsideration request was received, OWCP properly determined that the reconsideration request was untimely filed.

The Board finds that the evidence submitted by appellant in support of her application for review does not raise a substantial question as to the correctness of OWCP's most recent merit decision and is insufficient to demonstrate clear evidence of error. The critical issue in this case is whether appellant has shown clear evidence of error with respect to the underlying merit decision, which found that appellant did not meet her burden of proof to establish that she sustained an occupational disease in the performance of duty.

With his request for reconsideration, counsel submitted new medical reports from Dr. Patterson and MRI scan reports for the cervical and lumbar spine which did not address whether appellant's employment caused any particular condition. Dr. Patterson noted appellant's history, status, and opined that appellant had thoracic and lumbar sprain/strain injuries that were within a reasonable degree of medical certainty causally related to repetitive work activities such as lifting and twisting, bending, and stooping. The Board finds that this evidence is insufficient to show that OWCP's denial of the claim was erroneous or raise a substantial question as to the correctness of OWCP's determination that appellant did not meet her burden of proof to establish that she sustained an occupational disease in the performance of duty. While these reports offer some support for causal relationship, the Board has held that the term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized report, which if submitted prior to OWCP's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of a case.¹¹ The Board finds that this medical evidence is insufficient to shift the weight of the evidence in favor of appellant's claim or raise a substantial question that OWCP erred in denying her claim.

⁹ *Id.*

¹⁰ *See supra* note 6.

¹¹ *D.G.*, 59 ECAB 455 (2008).

Therefore, the Board finds that appellant has not presented clear evidence of error.

On appeal, counsel for appellant argues that appellant's request for reconsideration was timely filed. However, as determined above, the request was not timely.¹² Counsel also made arguments on appeal pertaining to the merits of the claim. However, as noted, the Board does not have jurisdiction over the merits of the claim.

CONCLUSION

The Board finds that OWCP properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the March 14, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 24, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

¹² See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, 2.1602.4(b). The date the reconsideration request was scanned into iFECS was March 11, 2014.